

M e m o r a n d u m

To : Mr. Ramon J. Hirsig
Executive Director, MIC:73

Date: November 22, 2006

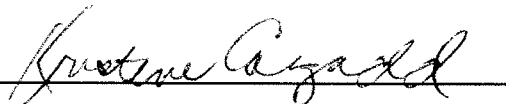
From : Kristine Cazadd, Chief Counsel
Legal Department, MIC:83

Subject : Regulation 1591, *Medicines and Medical Devices*,
Regulation 1591.2, *Wheelchairs, Crutches, Canes, and Walkers*, and
Regulation 1591.4, *Medical Oxygen Delivery Systems*
Chief Counsel's Rulemaking Calendar
Board Meeting—December 12, 2006

Assembly Bill (AB) 646 (Ch. 706, Statutes of 2001), operative April 1, 2002, amended Revenue and Taxation Code section 6369 to include specified clinics in the definition of a health facility for purposes of the exemption from sales and use tax for medicines furnished by a health facility. To incorporate this provision, we request your approval to place proposed amendments to the regulations that include a definition of a health facility, Regulations 1591, 1591.2 and 1591.4, on the Chief Counsel's Rulemaking Calendar on December 12, 2006. Proposed amendments to Regulation 1591 also include two grammatical revisions. These changes are appropriate to process under Rule 100, without the normal notice and hearing process, because the proposed amendments are changes without regulatory effect and are revising grammar or would make the regulations consistent with a statutory change.

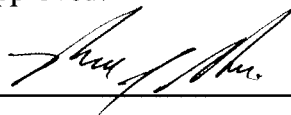
The strikeout and underlined versions of the regulations are attached. If you have any questions regarding this request, please let me know or contact Ms. Lisa Andrews at 322-5989.

Recommendation by:



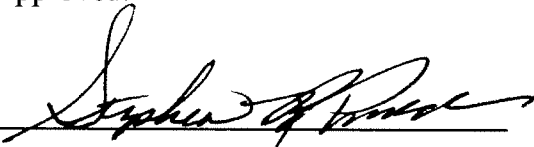
Kristine Cazadd, Chief Counsel

Approved:



Ramon J. Hirsig, Executive Director

Approved:



for Randie L. Henry, Deputy Director
Sales and Use Tax Department

BOARD APPROVED

At the _____ Board Meeting

Gary Evans, Acting Chief
Board Proceedings Division

Proposed Amendments to Regulation 1591.4

REGULATION 1591.4. MEDICAL OXYGEN DELIVERY SYSTEMS.

Reference: Sections 6006, 6369, and 6369.5, Revenue and Taxation Code, and sections 1200, 1200.1, 1204.1, and 1250 Health and Safety Code.

(a) DEFINITIONS.

(1) PHYSICIAN. "Physicians" are persons authorized by a currently valid and unrevoked license to practice their respective professions in this state. "Physician" means and includes any person holding a valid and unrevoked physician's and surgeon's certificate or certificate to practice medicine and surgery, issued by the Medical Board of California or the Osteopathic Medical Board of California and includes an unlicensed person lawfully practicing medicine pursuant to Section 2065 of the Business & Professions Code, when acting within the scope of that section.

(2) PRESCRIPTION. "Prescription" means an oral, written, or electronic transmission order that is issued by a physician, dentist, optometrist, or podiatrist licensed in this state *and* given individually for the person or persons for whom ordered. The order must include all of the following:

(A) The name or names and address of the patient or patients.

(B) The name and quantity of the drug or device prescribed and the directions for use.

(C) The date of issue.

(D) Either rubber stamped, typed, or printed by hand or typeset, the name, address, and telephone number of the prescriber, his or her license classification, and his or her federal registry number, if a controlled substance is prescribed.

(E) A legible, clear notice of the conditions for which the drug is being prescribed, if requested by the patient or patients.

(F) If in writing, signed by the prescriber issuing the order.

(3) HEALTH FACILITY. "Health Facility" as used herein has the meaning ascribed to the term in Section 1250 of the Health and Safety Code, and also includes "clinic" as defined in sections 1200 and 1200.1 of the Health and Safety Code.

(A) Section 1250 of the Health and Safety Code provides that "health facility" means any facility, place or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer.

(B) Section 1200 of the Health and Safety Code provides that "clinic" means an organized outpatient health facility which provides direct medical, surgical, dental, optometric, or podiatric advice, services, or treatment to patients who remain less than 24 hours, and which may also provide diagnostic or therapeutic services to patients in the home as an incident to care provided at the clinic facility. A place, establishment, or institution which solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury, where such advice, counseling, information, or referrals does not constitute the practice of medicine, surgery, dentistry, optometry, or podiatry, shall not be deemed a clinic for purposes of this subdivision.

(C) Section 1200.1 of the Health and Safety Code provides that "clinic" also means an organized outpatient health facility which provides direct psychological advice, services, or treatment to patients who remain less than 24 hours. As provided in section 1204.1 of the Health and Safety Code, such clinics serve patients under the direction of a clinical psychologist as defined in section 1316.5 of the Health and Safety Code, and are operated by a nonprofit corporation, which is exempt from federal taxation under paragraph (3), subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, or a statutory successor thereof, and which is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds, or contributions which may be in the form of money.

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goods, or services. In such clinics, any charges to the patient shall be based on the patient's ability to pay, utilizing a sliding fee scale. Such clinics may also provide diagnostic or therapeutic services authorized under Chapter 6.6 (commencing with section 2900) of Division 2 of the Business and Professions Code to patients in the home as an incident to care provided at the clinic facility.

(4) **MEDICAL OXYGEN DELIVERY SYSTEM.** A system used to administer oxygen directly into the lungs of the patient for the relief of conditions in which the human body experiences an abnormal deficiency or inadequate supply of oxygen. Devices that only assist the patient in breathing, but do not deliver air or oxygen directly into the lungs of the patient, do not qualify as medical oxygen delivery systems.

(b) TAX APPLICATION.

(1) **MEDICAL OXYGEN DELIVERY SYSTEMS.** Tax does not apply to the sale or use of medical oxygen delivery systems when sold, leased or rented to an individual for the personal use of that individual as directed by a licensed physician. Medical oxygen delivery systems include, but are not limited to, liquid oxygen containers, high-pressure cylinders, regulators, oxygen concentrators, tubes, masks and related items necessary for the delivery of oxygen to the patient. The term also includes repair and replacement parts for use in such a system.

(2) **VENTILATORS AND OTHER RESPIRATORY EQUIPMENT.** For the purposes of this regulation, ventilators that produce a form of controlled respiration in which compressed air is delivered under positive pressure into the patient's airways qualify for the exemption provided under Section 6369.5 for medical oxygen delivery systems. Pressure ventilators and volume ventilators provide assisted respiration and intensive positive pressure in which compressed air, a component of which is oxygen, is administered into the breathing systems of patients to help them breathe. The sale or use of ventilators, as described, is exempt from tax when sold or leased to an individual for the personal use of that individual as directed by a physician

Respiratory equipment that induces air into the lungs of a patient, through the application of pressure to the chest area, also qualifies for the exemption provided for medical oxygen delivery systems, regardless of whether the pressure applied is negative pressure or positive pressure. The sale or use of respiratory equipment, as described, is exempt from tax when sold or leased to an individual for the personal use of that individual as directed by a physician. Included within the scope of the exemption are exsufflation belts, iron lungs, chest shells, pulmo wraps, and the pumps and regulators necessary for the operation of the listed equipment.

(c) SALES TO HEALTH FACILITIES AND HEALTH CARE PROVIDERS. Sales of medical oxygen delivery systems are exempt when sold to an individual for his or her own use under the direction of a licensed physician. Sales of medical oxygen delivery systems to hospitals, immediate care facilities, physicians, or other health care providers for use on their premises are subject to tax in the same manner as other sales of tangible personal property.

A rental or lease of a medical oxygen delivery system to a health facility qualifies for an exemption from tax when the facility intends to lease or rent the system to an individual for the personal use of that individual as directed by a licensed physician and the system is then leased or rented as intended. However, the transaction between the health facility and the individual must constitute an actual lease or rental. When the patient's use of the medical delivery system is limited to the health facility's premises, the direction and control of the equipment does not transfer to the patient. Therefore, an actual lease or rental of the system to the patient does not occur even when a separate billing is made to the patient for the use of the system. As such, the lease or rental of the system to the health facility does not qualify for the exemption provided under Section 6369.5.

(d) SALES OF MEDICAL OXYGEN. Medical oxygen and other gases sold to a licensed physician and surgeon, podiatrist, dentist, or health facility for treatment of human beings are considered medicines. Therefore, their sale or use is not subject to tax when (1) furnished by a licensed physician and surgeon, podiatrist, or dentist to his or her own patient or (2) furnished by the health facility pursuant to the order of a licensed physician and surgeon, dentist, or podiatrist.

Medical oxygen sold by distributors of compressed gases to an individual for use as part of the individual's treatment, pursuant to a physician's prescription, is regarded as a medicine furnished by a licensed physician to his or her own

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patient for treatment of the patient as provided by Regulation 1591(b)(2). Sales of medical oxygen to individuals under the "Casey Bill" (i.e., the retailer bills the service acting as a fiscal agent for the State of California) are regarded as sales of medicines to this State for use in the treatment of human beings as provided by Regulation 1591(b)(5). Therefore, sales of medical oxygen by distributors, under these conditions, are not subject to tax whether or not the distributor is a medical supply house.

(e) SALES TO INSURED PERSONS. The exemption for qualifying retail sales of oxygen delivery systems and replacement parts is not affected by the fact that charges to the individual for whom such items are sold, leased, or rented may be paid, in whole or in part, by an insurer. This is so even though a joint billing may be made by the retailer in the name of both the person and the insurer.

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